Filed 6/27/19 Ryckman v. Superior Court CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GERALD OWEN RYCKMAN et al. as Trustees, etc., Petitioners, v. THE SUPERIOR COURT OF LOS ANGELES COUNTY, Respondent; DAVID DREXLER et al. as Trustees, etc., Real Parties in Interest.	B294148 (L.A. County Super. Ct. No. LC103510)

ORIGINAL PROCEEDING; petition for writ of mandate. Elaine W. Mandel, Judge. Petition granted.

Gerald Owen Ryckman, in pro per, for Petitioners.

No appearance for Respondent.

Tickner McCliman, Kere K. Tickner and Michelle M. McCliman for Real Parties in Interest.

INTRODUCTION

Gerald Ryckman petitions for a writ of mandate directing the superior court to vacate its order granting the real parties' motion for summary adjudication of his cause of action for breach of a written contract. The superior court held the alleged contract was unenforceable because it was based on past consideration, namely work Ryckman previously performed. We issued an alternative writ of mandate because we agreed with Ryckman that an existing obligation, such as to pay for work performed, can be good consideration for a new promise to pay. Respondent court declined to vacate its order, and we issued an order to show cause why a writ of mandate should not issue. We now grant the petition and direct the superior court to vacate its order granting the real parties' motion and enter a new and different order denying the motion on the claim for breach of written contract.

FACTUAL AND PROCEDURAL BACKGROUND

This case arose from the breakup of a longstanding working relationship between attorney David Drexler and his office manager and legal assistant Gerald Ryckman. It presents a cautionary tale about how the failure to adhere to formalities in employment matters can engender a host of disputes should the relationship sour.

A. The Parties' Working Relationship

Gerald Ryckman was working as a legal assistant for trial lawyer William Pollack when, in 1978, Pollack hired attorney David Drexler. In 1985, Drexler started his own firm and recruited Ryckman. Ryckman alleges Drexler was unable to pay him a traditional salary, so Drexler agreed to employ Ryckman for as long as Ryckman wished to work, and to pay Ryckman

what Drexler determined was the fair and reasonable value of Ryckman's work on cases. Ryckman alleges that once each case was resolved, Drexler evaluated Ryckman's work and added an amount to a running tally of what he owed Ryckman. Drexler then paid Ryckman periodic lump sum draws against the total wages he owed Ryckman, in amounts and at intervals of Drexler's choosing. Ryckman alleges "[t]o avoid any ethical impropriety, the lump sum draws paid Ryckman were not paid in connection to the distribution of attorney's fees recovered at the conclusion of any case."

Drexler's declaration filed in support of his motion for summary adjudication describes their arrangement in similar terms: "Ryckman did not have a set wage or salary," and was paid "in the form of discretionary distributions from accumulated savings generated by [the firm] which [it] distributed periodically depending on the existing financial conditions." Drexler stated it was his "custom and practice to pay Mr. Ryckman the same amount that [he paid himself.]" Like Ryckman, Drexler asserts "Ryckman's compensation was not paid based on the settlement of individual cases, and there was no division of attorneys' fees with Ryckman from settled cases."

B. Co-Ownership of Office Building

Ryckman alleges that in 2002 he and Drexler jointly purchased a three-story office building on Ventura Boulevard in Sherman Oaks, which Ryckman remodeled into a law office. In contrast, Drexler claims he purchased the building with a $300,000 down payment from his firm's operating account and a $600,000 mortgage he personally guaranteed. Drexler asserts Ryckman "did not contribute any money toward the purchase of the property" but "given our close relationship, [Drexler] added him as a co-owner" of the building. Drexler admits that "through

a series of transactions" his family trust and Ryckman's family trust now "share ownership" of the building equally.[1]

C. The Handwritten Notes

Ryckman alleges that in 2008 Drexler began falling behind in paying him and, by 2010, the amount of accumulated unpaid wages owed had reached approximately $2 million. According to Ryckman, he requested, and Drexler provided, a handwritten note stating: "To whom it may concern [¶] I owe Gerald Ryckman approximately $2,000,000 for work performed by him, to date, on cases currently being handled by my office. [¶] Sept. 1, 2010 [¶] *David Drexler*." Ryckman alleges that by executing the note Drexler modified their 1985 agreement so that rather than pay Ryckman in full for services rendered, Drexler would pay him what he could. Any unpaid balance owed Ryckman would be reflected in subsequent promissory notes handwritten by Drexler.

In April 2013, Drexler gave Ryckman a second handwritten note that read: "April 22, 2013 [¶] To whom it may concern, [¶] I owe Gerald Ryckman $2,000,000 for work performed by him to date on cases currently being handled by my office. [¶] *David Drexler*." Ryckman alleges this note represented a "new superseding promise . . . to pay Ryckman the full amount of $2,000,000 for services rendered by him."

In September 2013, Drexler provided Ryckman with a third handwritten note that stated: "To whom it may concern, [¶] This writing acknowledges monies owed to Gerald Ryckman for past services, rendered in connection with cases handled by the Law Offices of David Drexler, in the amount of $3,000,000 (Three

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[1] For this reason, Judith Ryckman and Lorraine Drexler are parties to the suit in their capacities as trustees of their respective family trusts.

million dollars) [¶] *David Drexler* [¶] 9-25-13." Ryckman alleges this note represented "a new superseding promise both orally and in the form of a Note . . . to pay Ryckman $3,000,000 for services rendered by him."

Finally, in 2014, Drexler gave Ryckman a handwritten note that Ryckman alleges states: "This will confirm that the Law Offices of David Drexler owes Gerald Ryckman $5,000,000 for services rendered on cases. [¶] *David Drexler* 8-5-14." Drexler alleges the figure in the note is $3 million, and the handwriting could arguably be interpreted either way. Only this fourth handwritten note, which Ryckman alleges was a "new superseding promise" Drexler made to pay him $5 million for his work up until the date of the note, is at issue here.

Ryckman ceased working for Drexler in August 2015. Drexler and Ryckman dispute whether he left voluntarily, or Drexler fired Ryckman after learning that Ryckman was suffering from bladder cancer.

D. The Lawsuit

In November 2015, the Drexlers sued the Ryckmans for partition of the office building their family trusts co-own. The Ryckmans filed a cross-complaint. The operative third amended cross-complaint alleged causes of action for (1) breach of contract (alleging a joint venture to operate the office building), (2) partition, (3) age-based discrimination, (4) medical condition-based discrimination, (5) failure to prevent discrimination, (6) wrongful termination in violation of public policy, (7) failure to pay all wages, (8) failure to pay minimum wage, (9) failure to pay overtime wages, (10) failure to provide itemized wage statements, (11) breach of written contract (based on the August 2014 note), (12) breach of oral contract (to employ Ryckman for life), and (13) unfair competition.

On December 13, 2017, the court sustained the Drexlers' demurrer to the seventh cause of action for failure to pay all wages without leave to amend. The court reasoned that the "allegations reveal that he was not a worker who was paid in a manner contemplated by the Labor Code provisions on which he relies. As Mr. Ryckman now confirms, he did not receive a regular 'rate of compensation.'. . . [¶] Mr. Ryckman's other causes of action more than adequately address his other theories of monies owed."

E. Summary Adjudication

On July 27, 2018, the Drexlers filed a motion for summary judgment or in the alternative summary adjudication, contending the 2014 handwritten note does not meet the requirements of a promissory note under the Uniform Commercial Code (UCC). The Drexlers also argued the 2014 note is unenforceable because past consideration is insufficient to support a valid contract. The Drexlers cited to Gerald Ryckman's prior arguments and testimony offering inconsistent explanations for the 2014 note, including that it represented rent and reimbursement for renovations he performed on the building their respective family trusts co-own, or that it represented one of several annual promises to pay wages owed to him for the year-to-date.[2]

In his declaration, cited in the separate statement in support of the motion for summary adjudication, David Drexler explained the promissory notes he gave to Gerald Ryckman as follows: "Mr. Ryckman has paranoia about flying. Since two of his brothers were killed in mid-air collisions, he repeatedly

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[2] The Drexlers also sought summary adjudication of Ryckman's remaining wage and hour claims and his other causes of action. The court granted some and denied others. Because none of these rulings is relevant here, we do not address them.

expressed his fear of death resulting from airplane crashes. The [handwritten notes] were requested by Mr. Ryckman on occasions before I was about to fly in an airplane for a scheduled trip. In each instance, Mr. Ryckman requested that I jot down a non-binding handwriting referencing an arbitrary amount of money. On each occasion, Mr. Ryckman stated that he wanted these handwritings to ease his fears and help him sleep when I took airplane flights for these scheduled trips. Each time Mr. Ryckman promised to throw the handwritings away upon my safe return, and he promised to never use them against me or my family. [¶] . . . [¶] These handwritings were not intended to be binding contracts or promissory notes. The handwritings were not intended to represent an acknowledgment for money owed to Mr. Ryckman. I did not owe Mr. Ryckman money for services he had performed."

Ryckman's declaration, filed in support of his opposition to the motion for summary adjudication, asserted the "amount stated in each note was the amount of accumulated unpaid wages owed to [him] by Drexler as of the time each note was prepared." Ryckman also stated that Drexler's travels "sometime[s] acted as a reminder to up date the running written accounting as to what Drexler owed [him]."

The superior court held hearings on the Drexlers' motion on October 17, 2018 and November 2, 2018. On November 6, 2018, the superior court issued a minute order that stated in pertinent part: "The Court makes additional rulings on the matter heard on 11.2.18 as to the first, 11th, and 12th submitted causes of action as follows: . . . Eleventh Cause of action—promissory note/agreement (August 2014). Drexlers' argument regarding the UCC is unpersuasive, as the agreement is not a straight note or a contract dealing with sales. The note is a promise to pay for past work performed; thus, Drexlers' argument regarding lack of

consideration is persuasive. Past work performed is not good consideration for the 'agreement.' GRANT."

F. Petition for Writ of Mandate

Ryckman filed a petition for writ of mandate in this Court, contending the superior court erroneously ruled past consideration could not support a written contract. As he did in his opposition below, Ryckman argues that under Civil Code section 1606,[3] an existing legal obligation is valid consideration for a new promise. Ryckman also contends his forbearance in collecting what Drexler owed him constitutes valid consideration.[4]

In his return, Drexler admits he authored the 2014 handwritten note, but contends it is not enforceable because past consideration cannot support a contract. Drexler also contends the handwriting is not a valid promissory note because it lacks a promise to pay at a definite time or on demand. Lastly, Drexler asserts the 2014 note identifies the sum owed as $3,000,000, not $5,000,000 as Ryckman claims.[5]

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[3] All statutory references are to the Civil Code unless otherwise indicated.

[4] Ryckman also asks this Court to direct the superior court to enter judgment in his favor on his contract claim. We cannot do so because Ryckman does not include his own motion for summary judgment among his exhibits and, as discussed below, there are material facts in dispute concerning whether Drexler in fact owed Ryckman outstanding amounts for work he performed.

[5] In his traverse, as well as at oral argument, Ryckman claimed the superior court's descriptions of the handwritten note as a " 'promissory note/agreement' " and a " 'promise to pay for past work performed' " represent the court's "findings" and "adjudications" that are res judicata, barring Drexler from

DISCUSSION

A. Standard of Review

"Since a motion for summary judgment or summary adjudication 'involves pure matters of law,' we review a ruling on the motion de novo to determine whether the moving and opposing papers show a triable issue of material fact." (*Travelers Casualty & Surety Co. v. Superior Court* (1998) 63 Cal.App.4th 1440, 1450.) Summary judgment is appropriate only if all the papers submitted show there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) A cause of action is deemed to have merit unless (1) "one or more of the elements of the cause of action cannot be separately established" or (2) a "defendant establishes an affirmative defense to that cause of action." (Code Civ. Proc., § 437c, subd. (o).) "In reviewing the propriety of a summary judgment, the appellate court independently reviews the record that was before the trial court. [Citation.] We must determine whether the facts as shown by the parties give rise to a triable issue of material fact." (*Hanooka v. Pivko* (1994) 22 Cal.App.4th 1553, 1558.) We view all the evidence and inferences reasonably drawn therefrom in the light most favorable to the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 843.)

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arguing otherwise in subsequent proceedings. They obviously are not, particularly as the descriptions set up the superior court's conclusion that "[p]ast work performed is not good consideration for the 'agreement.' "

B. The UCC Does Not Apply to the Enforeceability of the 2014 Handwritten Note

Drexler's primary argument in favor of summary judgment was that the UCC barred Ryckman's breach of written contract claim. The trial court found that argument unpersuasive, and we agree. Ryckman asserts he was rendering services to Drexler, and the UCC normally applies to "transactions in goods" (Cal. U. Com. Code, § 2102, and "does not apply to transactions involving service." (*TK Power, Inc. v. Textron, Inc*. (N.D. Cal. 2006) 433 F.Supp.2d 1058, 1061.) Nor is the 2014 handwritten note a promissory note as that term is used in the UCC concerning negotiable instruments—that is, a document containing "an unconditional promise to pay money signed by the person undertaking to pay, payable on demand or at a definite time." (*Saks v. Charity Mission Baptist Church* (2001) 90 Cal.App.4th 1116, 1132; see generally Cal. U. Com. Code, § 3101, et seq.) Accordingly, the 2014 handwritten note should not be judged by the UCC's requirements, but by standard contract law principles.

C. Section 1606 Supports a Reasonable Inference of Valid Consideration

Essential elements of a contract include mutual assent and consideration. (§ 1550.) "Consideration is a benefit conferred or agreed to be conferred upon the promisor or prejudice suffered or agreed to be suffered 'as an inducement' to the promisor." (*Conservatorship of O'Connor* (1996) 48 Cal.App.4th 1076, 1102, quoting § 1605.) It has long been the case that consideration may exist when a party renders services, or offers to render them. (E.g., *Parke etc. Co. v. San Francisco Bridge Co.* (1904) 145 Cal. 534, 538.)

Ryckman contends there is a triable issue of fact regarding whether the 2014 handwritten note memorializes an agreement

to pay for services he was rendering, made enforceable by section 1606. That Civil Code section provides: "An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise." Section 1606 clarifies that acknowledgment of an existing legal obligation is sufficient consideration for a contract. In addition, under section 1606, "the acknowledgment of a prior unenforceable obligation gives rise to a new enforceable promise, supported by a 'moral obligation' which is regarded as sufficient consideration . . . ." (*General Credit Corp. v. Pichel* (1975) 44 Cal.App.3d 844, 848; see also *Easton v. Ash* (1941) 18 Cal.2d 530, 534—535.)

The parties agree they had an informal method for calculating what Drexler owed Ryckman and when that amount would be paid. Drexler concedes that "Ryckman's compensation was based on Drexler's assessment that paying Ryckman the same amount Drexler paid himself was 'fair and reasonable.' " The evidence showed that Drexler would pay Ryckman large lump sums from time to time for work Ryckman had performed. And Drexler concedes that "[t]he amount of distributions was based on existing financial conditions . . . ."

On its face, the 2014 note states that Drexler's firm "owes Gerald Ryckman $5,000,000 [or $3,000,000, Drexler contends] for services rendered on cases." Construing all reasonable inferences in Ryckman's favor, there is a material dispute of fact whether the 2014 note memorialized an existing legal obligation to pay Ryckman for services he had rendered and was continuing to render, on which Drexler had not yet performed. Summary adjudication of that claim was therefore error. To the extent aspects of that oral agreement were no longer enforceable

because of the passage of time when memorialized in the 2014 note, section 1606 operated to turn any such unenforceable obligations into a new enforceable promise, supported by Drexler's moral obligation to pay for services rendered with the mutual expectation that they would be compensated.

The cases on which the Drexlers rely are not to the contrary. For example, the Drexlers point to *Dow v. River Farms Co.* (1952) 110 Cal.App.2d 403, 410 (*Dow*), which held that a board's resolution to pay an officer $50,000 "in consideration of his past services rendered" was unenforceable because it lacked good consideration. (*Id.* at pp. 404—405.) The Drexlers overlook the key distinction between *Dow* and this case. *Dow* held section 1606 did not apply because "when the services were rendered there was no expectation on [the officer's] part that he was to receive payment, or that the corporation intended to pay. There never was a past legal obligation, perfect or imperfect. The promise amounted to no more than a promise to make a gift and is unenforceable." (*Id.* at p. 411.) Here, there is evidence from which a fact finder could conclude Ryckman worked with the expectation of payment, Drexler intended to compensate Ryckman for his work, and the series of notes reflected the balance due as of each date.

Dow, a case now over 65 years old, also described what was then "a modern trend in the authorities in some states to the effect that where services are rendered under circumstances where the person rendering them reasonably may expect to be paid, and the person receiving them should expect to pay, a subsequent promise to pay is enforceable. [Citations.]" (110 Cal.App.2d at p. 410.) That is, of course, Ryckman's contention with regard to the 2014 note. *Dow* noted that section 1606, "which has been in our code since 1872," codified this common law rule. (*Id.* at p. 409.)

The Drexlers also cite *Passante v. McWilliam* (1997) 53 Cal.App.4th 1240, for the proposition that past consideration cannot support a contract. In *Passante*, a baseball card company needed $100,000 to purchase paper to produce its baseball cards. The company's attorney arranged a loan from his law partner's brother. (*Id.* at p. 1242.) Afterwards, the grateful directors agreed to give the attorney three percent of the company's stock. The directors later reneged on their promise, and the lawyer sued. The trial court set aside a jury verdict in the lawyer's favor, finding, among other things, that the lawyer had violated ethical standards in failing to advise the company that it might want to consult with another lawyer before making its promise. (*Ibid.*) The appellate court affirmed, reasoning that "[i]f the promise was *bargained for*, it was obtained in violation of *Passante*'s ethical obligations as an attorney. If, on the other hand, it was not bargained for—as the record here clearly shows—it was gratuitous. It was therefore legally unenforceable, even though it might have moral force." (*Id.* at p. 1243.) Here, in contrast, there is evidence to suggest attorney Drexler's alleged promise to pay was not gratuitous, but an inducement for the on-going work performed by Ryckman.

The Drexlers further argue that under section 1606, "a moral obligation may constitute sufficient consideration only when it is derived from a prior valid and enforceable legal obligation." In support, they quote from Witkin that, " '[i]n the absence of a prior legal obligation founded upon valuable consideration, a moral obligation is insufficient.' " These are correct statements of the law, but they do not support summary adjudication. Ryckman's breach of written contract claim is based on evidence (which Drexler disputes) of a prior, valid, and enforceable agreement to compensate him for services rendered.

Lastly, Drexler claims the grant of summary judgment on Ryckman's separate wage-related causes of action means there is no consideration for the 2014 note. The grant of summary judgment on those claims in no way suggests a lack of consideration. Drexler was not an hourly employee subject to minimum wage or overtime, and the Labor Code provisions at issue in his wage claims were distinct from the law applicable to his breach of written contract claim. The statute of limitations applicable to the respective claims were also distinct. The disposition of the wage claims in no way controls the result here.

Accordingly, we conclude that the trial court's ruling that the note failed as a matter of law for lack of consideration was in error, and the order so holding must be vacated.

DISPOSITION

The petition for writ of mandate is granted. Let a peremptory writ of mandate issue, directing the trial court to vacate its November 6, 2018 order granting the real parties' motion for summary adjudication of Ryckman's eleventh cause of action for breach of a written contract and to issue a new and different order denying same. Petitioners are entitled to recover costs on appeal.

NOT TO BE PUBLISHED.

WEINGART, J.*

We concur:

ROTHSCHILD, P. J.

BENDIX, J.

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* Judge of the Superior Court of Los Angeles County, assigned by the Chief Justice, pursuant to article VI, section 6 of the California Constitution.